

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JERE SCOLA, JR.,)	
)	
Plaintiff)	
)	
v.)	Docket No. 95-379-P-H
)	
BEAULIEU WIELSBEKE, N.V., et al.,)	
)	
Defendants)	

**MEMORANDUM AND RECOMMENDED DECISION ON DEFENDANTS’
MOTION FOR FEES, COSTS AND EXPENSES¹**

The defendants, Beaulieu Wielsbeke, N. V. (“Beaulieu”) and Dominiek de Clerck, request this court to award them a portion of their attorney fees and expenses, as well as their costs, incurred in the defense of this action, the merits of which have been resolved by the entry of summary judgment in their favor. Docket No. 65. The defendants’ motion is based on 28 U.S.C. § 1927 and the court’s “inherent power” to sanction offensive conduct by parties and their counsel in the course

¹ I determine that I have the authority under 28 U.S.C. § 636(b)(1)(A) to hear and determine the issues raised in the pending motion to the extent that it concerns underlying pretrial conduct. *Grimes v. City & County of San Francisco*, 951 F.2d 236, 239-40 (9th Cir. 1991) (magistrate judge may impose sanctions relating to discovery); *Bergeson v. Dilworth*, 749 F. Supp. 1555, 1561-62 (D. Kan. 1990) (magistrate judge may sanction any pretrial conduct). In this case, the only matters not clearly based on conduct occurring before summary judgment for the defendants was entered on all claims are the fees and costs associated with the defendants’ renewed motion for sanctions (Docket No. 107) and the defendants’ bill of costs relating to the appeal (Docket No. 102). My decision as to those two items is thus a recommended one.

of litigation.² I deny the motion as to attorney fees and expenses incurred before the entry of summary judgment. Costs incurred before the entry of summary judgment will be awarded in accordance with Fed. R. Civ. P. 54(d)(1). I recommend that the motion as to attorney fees and expenses incurred after the entry of summary judgment be denied and that costs incurred after the entry of summary judgment be awarded in accordance with the applicable rules.

I. Procedural Background

The complaint in this action, alleging breach by the defendants of a settlement agreement entered into by the parties in resolution of an earlier action brought in this court by the plaintiff, was filed on November 29, 1995. Docket No. 1. The defendants filed an answer and counterclaim on February 16, 1996. Docket No. 2. Discovery disputes were heard by the court on April 17, June 25, August 19, and November 13, 1996. Docket Nos. 6, 11, 21, & 61. A stipulation of dismissal of the counterclaim was filed on June 17, 1996. Docket No. 10.

The defendants filed a motion to dismiss all claims or for summary judgment on July 15, 1996. Docket No. 15. On August 23, 1996 the defendants filed a motion to strike affidavits that accompanied the plaintiff's response to the motion to dismiss. Docket No. 23. On September 18, 1996 the defendants filed a motion in limine to preclude the testimony of the plaintiff's expert witness at trial. Docket No. 28. On September 23, 1996 the defendants filed a motion to dismiss all claims on the grounds of alleged fabrication of evidence, perjury and obstruction of justice by the plaintiff. Docket No. 30. On October 1, 1996 the plaintiff filed a motion for sanctions. Docket No.

² A separate motion for sanctions brought by the defendants pursuant to Fed. R. Civ. P. 11 has been denied. Docket No. 87. The materials submitted by the parties concerning the instant motion (Docket No. 85) also address that motion.

33. On October 18, 1996 the defendants filed an objection to the filing of deposition transcripts by the plaintiff. Docket No. 41. On October 28, 1996 the plaintiff filed a motion for partial summary judgment. Docket No. 50. On October 30, 1996 the defendants filed a second motion for summary judgment. Docket No. 55.

By order dated November 21, 1996 this court granted summary judgment in favor of the defendants. Docket No. 65. The docket entry records the granting of Docket No. 55, denial of Docket No. 50, and the mooted of Docket Nos. 41, 33, 30, 28, 23 and 15. The plaintiff moved for reconsideration of this order on December 18, 1996. Docket No. 72. The defendants filed on December 19, 1996 a bill of costs, Docket No. 69, and January 3, 1997 a motion for clarification that a Rule 11 motion for sanctions is not governed by Local Rule 32, Docket No. 75. The motion for reconsideration was denied on January 7, 1997. Endorsement on Docket No. 72. The motion for clarification was denied on January 10, 1997. Endorsement on Docket No. 75.

The plaintiff filed a notice of appeal on January 16, 1997. Docket No. 83. On January 21, 1997 the defendants filed the instant motion for attorney fees, costs and expenses, Docket No. 85, and a motion for sanctions under Fed. R. Civ. P. 11, Docket No. 87. An amended judgment was entered on January 23, 1997. Docket No. 90. The defendants filed a notice of appeal from the amended judgment on February 6, 1997. Docket No. 98. On December 23, 1997 the opinion of the First Circuit dismissing the appeal for lack of jurisdiction was filed in this court. Docket No. 101. The defendants filed a supplemental bill of costs on December 31, 1997. Docket No. 102. The mandate of the First Circuit was entered on the docket of this court on January 15, 1998. Docket No. 105. The defendants filed a renewal of their motions for sanctions and attorney fees on January 20, 1998. Docket No. 107. The motion for sanctions pursuant to Rule 11 was denied on February 17,

1998. Endorsement on Docket No. 87. On March 5, 1998 the defendants filed a notice of appeal from this denial. Docket No. 112.

II. Discussion

A. Sanctions (Attorney Fees and Expenses)

Section 1927 of Title 28 of the United States Code provides:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Sanctions awarded pursuant to this statute may be assessed only against the plaintiff's counsel and not against the plaintiff personally. *Bolivar v. Pocklington*, 975 F.2d 28, 33 n.13 (1st Cir. 1992). In the First Circuit, an award of sanctions under section 1927 does not require a finding of subjective bad faith by the offending attorney. *Cruz v. Savage*, 896 F.2d 626, 631-32 (1st Cir. 1990).

The courts also have inherent power to sanction the conduct of attorneys and parties. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991).

[W]hen there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the [Federal Rules of Civil Procedure], the court ordinarily should rely on the Rules rather than the inherent power. But if in the informed discretion of the court, neither [28 U.S.C. § 1927] nor the Rules are up to the task, the court may safely rely on its inherent power.

Id. at 50. The inherent power must be exercised with restraint and discretion. *Id.* at 44.

The defendants' motion asserts several grounds for the award of fees and expenses which it seeks pursuant to section 1927 and the court's inherent power: (i) that the plaintiff, during the discovery period, "did a mass mailing to executives in the carpet manufacturing and related

businesses . . . solely to defame, harass and vex defendants,” and that Cote, plaintiff’s counsel,³ should have stopped the plaintiff from undertaking this activity, Defendants’ Brief in Support of Their Motion for Fees, Costs and Expenses (“Defendants’ Brief”) (Docket No. 86) at 3-4; (ii) the plaintiff threatened in Cote’s presence to ruin the defendants if they did not immediately pay him about \$900,000, *id.* at 6; (iii) the affidavit submitted by the plaintiff in opposition to the defendants’ motion to dismiss was composed of “vexatious but totally irrelevant” accusations, *id.* at 6-7; (iv) Cote’s affidavit submitted in opposition to the defendants’ motion for summary judgment “dealt largely with the unproven and irrelevant allegations Scola made” in the earlier, settled action, *id.* at 7; (v) it was “unethical and improper” for Cote to serve as the plaintiff’s counsel in this action both because he “has lost all objectivity” and is “pursuing his own personal vendetta against defendants” and because he was a necessary witness concerning the settlement agreement that is the subject of this action, *id.* at 7-8; (vi) the plaintiff violated this court’s order dated April 17, 1996 (Docket No. 6) by serving supplemental answers to interrogatories that were “nothing more than a pack of lies,” and Cote made no inquiry before filing the supplemental answers to determine whether there was evidentiary support for them, *id.* at 9; (vii) Cote violated this court’s order dated August 19, 1996 (Docket No. 21) when he allowed the plaintiff to hand-deliver copies of certain tax returns to defendants’ local counsel, across which the plaintiff had written “Attorneys Only,” instead of delivering the originals himself, *id.* at 9, 13; (viii) the plaintiff committed perjury, obstructed discovery, and fabricated evidence during his deposition, *id.* at 10; (ix) the plaintiff presented a “mountain of discovery” that required the defendants to seek and obtain a 60-day extension of the

³ The defendants apparently do not seek an award of attorney fees or other sanction against Attorney Wroblewski, who has also appeared on behalf of the plaintiff in this action.

discovery deadline that would not have been necessary but for the plaintiff's "false swearing" and Cote's "lack of diligence," *id.* at 11; (x) the defendants had to hire two private investigators, at a cost of almost \$25,000, to interview all of the potential witnesses identified by the plaintiff, all but two of whom did not support the plaintiff's version of events, *id.*; (xi) it was necessary for the defendants to take the depositions of these witnesses, because they were out of state, at a cost of over \$30,000, *id.* at 12; (xii) the defendants incurred the costs of filing a motion to dismiss and the motions for sanctions and attorney fees due to the plaintiff's "prevarications and fabrication of evidence," *id.*; (xiii) the plaintiff could not produce any evidence to support the figure for his 1980 income used by his economic expert, making it necessary for the defendants to file the motion seeking to bar the expert's testimony at trial, *id.* at 12-13; (xiv) the plaintiff wrongfully refused to produce his telephone records, then falsely swore that he would produce some records, then filed an affidavit on this issue that is "a masterpiece of double talk and gobbledygook" which Cote did not bother to review, *id.* at 14-15; and (xv) the plaintiff and Cote knew or should have known by April 18, 1996 that this action had no merit but did nothing about it, *id.* at 15.

Most of these allegations are presented in the defendants' Motion to Strike Affidavits (Docket No. 23), Motion in Limine to Preclude the Testimony of Plaintiff's Expert (Docket No. 28), and Motion to Dismiss for Fabrication of Evidence, Perjury and Obstruction of Justice (Docket No. 30).⁴ That fact does not preclude their consideration here. However, to the extent that these

⁴ The plaintiff argues that the fact that each of these motions was mooted by the entry of summary judgment for the defendants means that the instant motion is moot insofar as it "repeat[s] what was mooted in the prior . . . motions." Plaintiff's & Cote's Response to Defendants' Motions for Sanctions under Rule 11, 28 U.S.C. § 1927, and the Inherent Power of the Court ("Plaintiff's Response") (Docket No. 108) at 9. The plaintiff understandably cites no authority for this clearly meritless argument.

allegations are presented in the defendants' Rule 11 motion (Docket No. 87), which has been denied, they cannot be considered as a basis for the imposition of sanctions under this court's inherent power. The defendants may not use the court's inherent power to avoid the effect of their failure to comply with the safe harbor requirements of Rule 11. If Rule 11 would have provided a remedy for any of the wrongs asserted in this motion, no relief involving the exercise of the court's inherent power is available here. *See United States v. One 1987 BMW 325*, 985 F.2d 655, 661 (1st Cir. 1993) (where Civil Rules limit nature of sanction that can be imposed, court may not use its inherent power to circumvent Rules' specific provisions).

The defendants merely incorporate by reference into their Rule 11 motion all of the allegations of sanctionable conduct by the plaintiff and Cote that are made in the instant motion. Brief in Support of Defendants' Rule 11 Motion and Rule 59(e) Motion (Docket No. 88) at 1. Fed. R. Civ. P. 11(b) provides:

By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, —

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence

or, if specifically so identified, are reasonably based on a lack of information or belief.

Subsection (c) of Rule 11 makes clear that sanctions for violation of subsection (b) may be imposed upon attorneys or parties. Rule 11 sanctions are not available to address disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 23 through 37. Fed. R. Civ. P. 11(d). As an initial step, it is thus necessary to review the grounds asserted in the instant motion to identify those which were within the scope of the defendants' Rule 11 motion.

Grounds (i), (iii) and (iv) and that portion of (vi) concerning Cote's alleged failure to make inquiry, asserted in support of the instant motion, are clearly within the scope of Rule 11 and are mentioned in defendants' Rule 11 motion. Accordingly, they will be considered here as grounds for sanctions only under section 1927.

Next, under *Chambers*, the inquiry must focus on any claims for which the Federal Rules of Civil Procedure provide a remedy, because the court should not resort to its inherent power for sanctions in instances where the rules are "up to the task." *Chambers*, 501 U.S. at 50. Grounds (i), (iii) and (iv) deal with alleged Rule 11 violations. Grounds (vi), (vii), (viii), (ix), (xiii) and (xiv) deal with alleged discovery violations, for which Fed. R. Civ. P. 26(g)(3) and 37 provide remedies and sanctions. In addition, the events described in grounds (x) and (xi) would not have occurred but for the alleged discovery violations and therefore must be included within the scope of the available sanctions for discovery violations.

The defendants argue that the rules do not displace the court's inherent power to sanction. This contention is correct, as far as it goes. In *Chambers*, the Supreme Court held that a federal court is not forbidden to sanction bad-faith conduct under its inherent power simply because that conduct

could also be sanctioned under the rules, but also admonished that, where sanctions provided by the rules would be adequate, the court “ordinarily ” should rely on the rules. 501 U.S. at 50. Here, I discern no conduct set forth in grounds (i), (iii), (iv), (vi)-(xi) and (xiii)-(xiv) that could not be adequately sanctioned under the rules.⁵ In addition, none of this alleged conduct, to the extent that it involves Cote, can be fairly characterized as vexatiously multiplying the proceedings, as is required for the imposition of sanctions under section 1927. In the First Circuit, “section 1927’s requirement that the multiplication of the proceedings be ‘vexatious’ necessarily demands that the conduct sanctioned be more severe than mere negligence, inadvertence, or incompetence.” *Cruz*, 896 F.2d at 632. The Rule 11 and discovery violations alleged against Cote do not involve conduct more severe than negligence or incompetence.

I also conclude that sanctions under the court’s inherent power are not warranted against either the plaintiff or Cote for the alleged discovery violations and their sequelae. While the plaintiff’s professed good-faith belief that all of the recruiters and potential employers whom he named had actually contacted Rainbow Rugs, his former employer, and received negative information about him in violation of the settlement agreement strains credulity, and the plaintiff’s behavior surrounding the request for his telephone records cannot be condoned, sanctions in both instances were available under the Federal Rules of Civil Procedure, if warranted. The court’s inherent power to shift attorney fees “should be used sparingly and reserved for egregious

⁵ Grounds (vii) and (xiii), in particular, would not justify the imposition of sanctions in any event. Delivery of the tax returns by the plaintiff instead of his attorney is truly a *de minimis* violation of the discovery order, and the writing on the copies by the plaintiff, while objectionable and not to be condoned, did not violate the discovery order. The unavailability of a particular tax return to support the testimony of the plaintiff’s expert goes to the weight of his testimony, not its admissibility. The lack of such a document simply is not grounds for sanctions.

circumstances.” *Jones v. Winnepesaukee Realty*, 990 F.2d 1, 4 (1st Cir. 1993). After review of the interrogatory answers and deposition testimony characterized by the defendants as “perjury,” I conclude that the evidence submitted does not establish perjury. Moreover, the conduct generally of the plaintiff and Cote related to discovery that is alleged by the defendants to require sanctions under the court’s inherent power, while certainly not admirable, is not sufficiently vexatious, wanton or oppressive, *Chambers*, 501 U.S. at 45-46, to justify the sanctions sought by the defendants.

The remaining grounds identified by the defendants are (ii), (v), (xii) and (xv). Number (xii) deals only with the costs incurred in filing motions to deal with the alleged sanctionable conduct and thus comes into play only if the court awards sanctions based on any of that conduct by the plaintiff or Cote. Number (v) is asserted against Cote alone: that he should not have represented the plaintiff in this action. The record reflects no motion by the defendants to remove Cote from this case. The defendants cite no authority for the proposition that this was sanctionable conduct under section 1927 or the court’s inherent power. While it may well have been unwise for Cote to represent the plaintiff in this action in which he was likely to be a witness, given Maine Bar Rule 3.5(b)(1), the fact that he chose to do so did not itself multiply the proceedings. Accordingly, section 1927 is not applicable to this asserted ground for sanctions.

The allegation in ground (xv) that the plaintiff and Cote knew or should have known by April 18, 1996, when they served supplemental responses to the defendants’ interrogatories, that this action had no merit is simply incorrect. As Chief Judge Hornby’s order granting the motion for summary judgment, dated November 21, 1996, makes clear, the settlement agreement at issue in this action was transcribed with “puzzling punctuation and paragraphing,” Order on Defendant’s [sic] Motion for Summary Judgment (Docket No. 65) at 2, and the written agreement “present[s] puzzling

syntax,” *id.* at 4. The parties’ dispute concerned the appropriate interpretation of the language of the agreement. It cannot be said that continuing with this litigation after serving the supplemental interrogatory answers was needless or without any apparent legitimate purpose, conditions which would justify sanctions under section 1927, *Sussman v. Bank of Israel*, 56 F.3d 450, 460 (2d Cir. 1995), or that the plaintiff and Cote were at that point maintaining an unfounded action without any reasonable hope of prevailing on the merits, which would justify sanctions under the court’s inherent power, *Whitney Bros. Co. v. Sprafkin*, 60 F.3d 8, 14 (1st Cir. 1995).

The final ground for sanctions, asserted against both the plaintiff and Cote, alleges that the plaintiff attempted to “blackmail” the defendants into settling this action, an attempt which the defendants reported to this court three months after it occurred. Letter dated August 27, 1996 from Caroline Kresky, Esq. to Hon. David M. Cohen, Exh. 9 in Appendix to Brief in Support of Defendants’ Motion Under 28 U.S.C. § 1927, etc. (submitted with Docket No. 87), at 3. The defendants cite no authority for their contention that the described conduct was sanctionable. There is no sense in which it could have multiplied the proceedings, making section 1927 inapplicable. What the defendants describe is possibly a heavy-handed attempt at settlement negotiation. In any event, it does not rise to the level of bad-faith conduct of the sort that would justify the imposition of sanctions under the court’s inherent power.

In summary, the tone and extent of the parties’ filings in connection with the instant motion and the mooted motions demonstrate that both sides of this controversy have lost objectivity, abandoned civility, and invested this case with far more time, effort and personal value than it deserved. My decision to deny the motion for sanctions should not be taken to condone the actions of the plaintiff or counsel on either side in any respect. The important point is that the circumstances

do not present sufficient grounds to impose sanctions under section 1927, *cf.*, *e.g.*, *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1544 (11th Cir. 1993) (attorneys' participation in cover-up of discoverable material, failure to comply with court order to produce deposition transcripts, and campaign to obfuscate the truth throughout discovery justified § 1927 sanction), or the court's inherent power, *see Morgan v. Hatch*, 118 F.R.D. 6, 9 (D. Me. 1987) (defense counsel's failure to comply with discovery requests, respond to motions, or comply with scheduling order is proper subject of inherent power of sanction).

B. Costs

The defendants include a request for an award of costs in their motion for sanctions, but they have also filed separate bills of costs. Docket Nos. 69 and 102. Costs are not awarded as a sanction, but rather as a matter of course to the prevailing party pursuant to Fed. R. Civ. P. 54(d)(1). The plaintiff argues that no costs should be imposed on him at all for two reasons: misconduct by the defendants' attorneys and his poor financial condition. Plaintiff's Memo in Opposition to Defendants' Bill of Costs (Docket No. 78) at 1-2 and Plaintiff's Memo in Opposition to Defendants' Bill of Cost for Appeals ("Second Opposition") (Docket No. 104) at 1-2.

The plaintiff cites no authority for his contention that misconduct by counsel for the prevailing party bars an award of costs, beyond citation to a case in which the First Circuit stated that "[t]he award of costs is a matter given to the discretion of the district court." *Rodriguez-Garcia v. Davila*, 904 F.2d 90, 100 (1st Cir. 1990). The First Circuit subsequently noted that "the power to deny recovery of costs that are categorically eligible for taxation under Rule 54(d) . . . operates in the long shadow of a background presumption favoring cost recovery for prevailing parties." *In re*

San Juan Plaza Hotel Fire Litig., 994 F.2d 956, 962 (1st Cir. 1993). The misconduct alleged by the plaintiff as the basis for overcoming this presumption here is that “defendants would not have won this case on summary judgment if their attorneys had told the truth as far as the meaning of the settlement agreement.” Second Opposition at 2. The issue of the meaning of the settlement agreement has been resolved by the court’s order granting summary judgment to the defendants and may not be revisited in the context of a bill of costs.

The plaintiff relies on *Papas v. Hanlon*, 849 F.2d 702, 704 (1st Cir. 1988), to support his argument that his poor financial condition exempts him from the operation of Rule 54(d). In that case, “[t]he only issue to be resolved on review [was] whether the district court may allow . . . costs [under Rule 54(d)] against a litigant who has been permitted to proceed in forma pauperis (IFP).” *Id.* at 703. Here, the plaintiff has not sought such status, and that distinction is critical. *See Burroughs v. Hills*, 741 F.2d 1525, 1533 (7th Cir. 1984) (reversing district court’s denial of costs to prevailing party on grounds, *inter alia*, that losing parties, while not indigent, were of limited means). In this court, a lack of resources does not relieve the losing party of his obligation to pay costs under Rule 54(d). *Halasz v. University of New England*, 821 F. Supp. 40, 42 (D. Me. 1993).

The plaintiff raises additional objections to certain items included in the defendants’ bills of costs. Those matters will be addressed in the usual manner by the clerk.

Costs other than those sought in the second bill of costs (Docket No. 102), which deals with conduct after the entry of summary judgment, are to be award in a manner consistent with this decision. I recommend that the costs sought in the second bill of costs also be so awarded.

III. Plaintiff’s Request for Attorney Fees

The plaintiff includes in his objection to the motions for sanctions a request for an award of attorney fees pursuant to Rule 11. Plaintiff's Response at 40. This conclusory request, at the close of a memorandum submitted in opposition to a motion, does not comply with the terms of Fed. R. Civ. P. 11(c)(1) ("A motion for sanctions under this rule shall be made separately from other motions or requests . . ."). It is impossible to discern from the plaintiff's request whether the conduct for which sanctions under Rule 11 are sought occurred entirely before the entry of summary judgment. To the extent that it did not, I recommend that the plaintiff's request be denied. Insofar as the request is directed toward conduct that occurred before the entry of summary judgment, it is denied.

IV. Conclusion

For the foregoing reasons, the defendants' motions for fees, costs and expenses are **DENIED** insofar as they seek sanctions in the form of attorney fees and expenses for conduct that occurred prior to the entry of summary judgment. For conduct occurring thereafter, I recommend that the motions be **DENIED**. Costs incurred before the entry of summary judgment are to be awarded pursuant to Fed. R. Civ. P. 54(d). I recommend that costs incurred after the entry of summary judgment also be awarded pursuant to the applicable rules. I recommend that the plaintiff's request for an award of attorney fees pursuant to Fed. R. Civ. P. 11 be **DENIED** insofar as it relates to conduct occurring after the entry of summary judgment. To the extent that the plaintiff's request refers to conduct occurring before the entry of summary judgment, it is **DENIED**.

Dated this 16th day of March, 1998.

David M. Cohen
United States Magistrate Judge